Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability	))))))))	CC Docket No. 98-147

REPLY COMMENTS OF THE COMMERCIAL INTERNET EXCHANGE ASSOCIATION

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Date: October 16, 1998

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INTRODUCTION AND SUMMARY

The Commercial Internet eXchange Association ("CIX"), by its attorneys, files this reply in response to the comments on the Advanced Services Notice of Proposed Rulemaking.[1] CIX is a trade association that represents over 150 Internet Service Providers who handle over 75% of the United States' Internet traffic.[2] On reply, CIX responds to four points raised in the comments that are of critical importance to the independent ISP industry. First, if structural separation is adopted, the rules must completely expunge the affiliate's ILEC market advantages derived from the ILEC monopoly, so that the affiliate is no better off than any other CLEC. Second, the regulatory safeguards under the integrated approach – where the ILEC opts not to establish a

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1 *In the Matter of Deployment of Wireline Service Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Dkt. Nos. 98-147, et al., FCC 98-188 (rel. Aug. 7, 1998) ("NPRM" and "MO&O").

2 The views expressed herein are those of CIX as a trade association, and are not necessarily the views of each individual member.

separate affiliate – must be addressed in this proceeding to avoid continuing monopoly abuse. Third, under either approach, ISP choice in the hands of the consumer, and not the ILEC, is a critical safeguard. Finally, RBOCs that seek to provide interLATA Internet services should do so by meeting the requirements of the statutory Section 271/272 processes.

It is critical for the Commission to decide the advanced services and ISP issues in a comprehensive and expeditious manner. A comprehensive approach will best resolve the regulatory "gridlock." The Commission should act expeditiously because, otherwise, time is short for the United States to maintain its position as the world's technology and regulatory leader. Moreover, a definitive set of federal rules that provide open competitive access and ISP choice will enable the United States to make full use of the tremendous capacity being built into today's national and international communications networks.

DISCUSSION

I. Separate Subsidiary Requirements Must Ensure That the ILEC Affiliate Is Divorced From ILEC Monopoly Advantages.

As a matter of law and policy, the Commission must ensure that the ILEC option of a separate subsidiary establishes an ILEC-affiliate that is truly separate. CIX generally agrees with many non-ILEC commenters that "separation" means the separate subsidiary is not advantaged in any form – either by transfers of facilities or brand-names, by joint marketing arrangements or sharing employees/management, or with financial support from the ILEC or parent holding company.

Section 251(h) defines an "incumbent local exchange carrier" broadly to include affiliates that are successors or assigns or that hold a comparable market position as the ILEC. 47 U.S.C. § 251(h)(1)&(2). Thus, to avoid the obligations of ILEC status, the affiliate must demonstrate

that it derives no material advantage in the market, i.e., it is no better off than any other CLEC.[3] Unless the affiliate is formed and maintained as a wholly separate competitor, the statute and the MO&O mandate that the ILEC's advanced telecommunications services are subject to the same regulatory treatment as the ILECs other local telecommunications services.

CIX agrees with many commenters that there are also critical policy reasons to hold the ILEC affiliate to a higher degree of separation. The ILECs' own comments underscore the problems likely to emerge if the affiliate were not wholly separate from the ILEC. The ILECs, for example, intend to engage in joint planning, joint development of products and joint sales and marketing efforts,[4] including joint product discounts.[5] However, these ILEC/affiliate actions would destroy the independence of the separate subsidiary, would make it extremely difficult for regulators to police the cost allocations of joint efforts, and would provide the affiliate with critical information on ILEC network deployment not shared with other competitors. Many of the ILECs also intend to share CPNI with their affiliate,[6] to share employees and management, to transfer assets previously paid for by the ILEC, and to provide the affiliate with joint and aggregate billing along with the ILEC's regulated telephone services.[7] However, these actions would essentially transfer to the affiliate, free of charge, the monopoly market vestiges that are key to the ILEC; i.e., access to customer information and billing, essential facilities and

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3 As the Commission found in the MO&O (at ¶ 57), Section 251(c) applies to ILEC provision of any telecommunications service, including advanced telecommunications service.

4 Comments of Bell Atlantic at 28.

5 Comments of SBC at 6.

6 Comments of Bell Atlantic at 30; Comments of SBC at 6.

7 Id.

collocation, facility procurement using the regulated rate base. The sharing of employees and managers would allow the ILEC to control the affiliate's decision-making, and eliminate the affiliate's role as an independent CLEC entrant to the market.

Finally, Bell Atlantic proposes to have the parent holding company fund the affiliate, without any regulatory constraints and including funds derived from ILEC telephone company profits.[8] Funneling ILEC monopoly profits to the affiliate (via the parent holding company) would completely undermine the affiliate's economic incentives to act as a competing LECs. Instead, the affiliate would be financially dependent on the ILEC and so would act in concert with the ILEC's monopoly interests. This is the antithesis of a truly separate subsidiary.

II. Regulatory Safeguards to Ensure a Competitive ISP Market Must Be In Place As ILECs Pursue an Integrated Approach to Advanced Services

In addition to the separate affiliate approach, ILECs are currently pursuing full-scale launches of xDSL services using an integrated approach, whereby the regulated telephone company and its Internet access affiliate jointly market and sell a combined Internet and xDSL offering. As the Commission found in the MO&O, Section 251(c) and other ILEC regulation apply fully to the ILEC's services under the integrated approach. However, the integrated approach also significantly impacts competition in the ISP industry, and the Commission must address those issues concurrently with this proceeding.[9]

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[8] Comments of Bell Atlantic at 31.

[9] CIX cannot agree with BellSouth's conclusion from Computer II and Computer III that consumers are better off, and "have greater access to an increasing variety of innovative enhanced services," under the current regulatory protections of the integrated approach. As the record of the Computer III FNPRM proceeding shows, the integrated approach provides ILECs with the means and the motive to discriminate against an entire market of independent ISPs, which has a dampening effect on the overall variety of services to consumers. See also Comments of America OnLine at n.13 (cataloging recent complaint proceedings of ILEC abuses against ISPs).

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First, the Commission should address ILEC bundling practices for, xDSL services which CIX believes are flatly inconsistent with the Commission's prohibition on bundling of information service and CPE, 47 C.F.R. § 64.702(e). These practices take several forms, including: (1) bundling/marketing ISP service and xDSL service as a single product to consumers;[10] (2) free or discounted modems or installation services for consumers that opt for bundled ISP//DSL service;[11] (3) discounted ISP/DSL service for existing voice telephone service customers;[12] and (4) locking-in subscribers of such bundled packages to extended contracts.[13] CIX believes that these practices raise issues of compliance with the Commission's no-bundling rule, suggest risks of cross-subsidization between regulated and non-regulated services, and undermine the ability of independent ISPs to compete.

Further, the Commission must address the ISP nondiscrimination and access rules as it crafts appropriate regulatory safeguards for competition in the advanced telecommunications services markets. The ISP and the data telecommunications markets are mutually interdependent, and the Commission's approach in this proceeding should incorporate competitive regulations for both industries. A timely reform of ISP safeguards that began ten months ago with the Computer III FNPRM proceeding is especially critical now that the ILECs' have embarked on aggressive roll-out of xDSL services. CIX believes that it is not adequate to

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Moreover, it is the independent ISP industry, and not the ILECs, that have brought innovative Internet services to the American consumer.

10 See http://www.ameritech.net/visitors/adsl/adsl_faq.html.

11 See http://uswest.com/com/customers/interprise.

12 See http://www.bellsouth.net/external/adsl/cost.html.

13 See http://www.ba.com/nr/1998/Oct/1998100501.html; http://public.pacbell.net/dedicated/dsl_solutions.html

simply reform CLEC access rules, because ISP regulatory safeguards serve to protect the thousands of ISPs in today's market. These ISPs are not CLECs or CLEC-aligned. A functional set of regulations for ISPs also benefits consumers because ISPs are better able to enter the market quickly and inexpensively, can offer Internet services via telecommunications to meet a particularized demand, and the ISP is not burdened with a panoply of telecommunications obligations. This is how the ISP industry has brought a vast array of Internet services into today's market, and the Commission should revamp its pending rules to offer functional access and nondiscrimination protections for these providers.

III. Rules Providing Consumers With Real ISP Choice Are Necessary Under Both The Separate Affiliate Approach and the Integrated Approach

CIX emphasizes the point made in the CIX comments and echoed by other independent ISPs and associations that represent independent ISPs — consumers must maintain their ability to choose their preferred ISP.[14] Independent ISPs have been a primary factor in the proliferation of the Internet. Today, the vast majority of consumers continue to get their Internet services from independent ISPs, and not the Internet offerings of the ILECs. As ADSL and other technologies are deployed, it is of critical importance that choice and diversity of Internet access services be preserved, regardless of whether the ILEC offers DSL services in an integrated manner or through a separate affiliate.

Technological advances in the telecommunications underlying Internet access should not be used by ILECs as an opportunity to cut out consumer choice of Internet services. Likewise,

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[14] See Comments of: Mindspring Enterprises, Inc. at 6; The Information Technology Association of America at 18, The Internet Access Coalition at 8.

independent ISPs should not be forced to obtain CLEC status simply to avoid ILEC discrimination and to continue to offer competitive Internet Access for their customers.[15] To maintain and protect ISP choice, consumers should be able to choose their ISP on terms equivalent to those of the ILEC affiliated ISP, and ISPs should be able to obtain connectivity from ILECs, or their affiliates, in a non-discriminatory and efficient manner.

ISP choice means that the ILEC-affiliated ISP should not be thrust on the customer, nor should the customer be encouraged to select one ISP over another. Similarly, the ILEC-affiliated ISP should not be advantaged in ILEC marketing practices, including those that result from cross-marketing and bundling. However, recent ILEC marketing announcements for a package of xDSL, computers, web portals and Internet access continue to indicate that ILECs are attempting to sway away from consumer opportunities to select an ISP that is separate from the ordering of the underlying xDSL telecommunications.[16]

Several ILECs have also announced ISP "partnering" programs that they claim will allow ISPs to market the ILEC advanced DSL offerings.[17] The terms of such "partnering" programs are not public, and so CIX cannot respond fully to the advantages or disadvantages of such arrangements. However, based on what is known, CIX has a few initial concerns. First, it appears that such "partnering" will, in fact, relegate ISPs to the role of little more than a marketing outlet for the ILEC. In addition, the plans would limit an ISP's ability to offer a range

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15 See Comments of Mindspring Enterprise, Inc. at 30.

16 See http://www.ba.com/nr/1998/Oct/19981005001.html.

17 See http://www.ba.com; http://www.sbc.com/PB/News/Article.html?query_type=article&query=19980901-02.

of services by limiting the amount that an independent ISP could expect to earn.[18] The plans also appear to require the ISP to purchase only the ILECs' metropolitan transport arrangement (e.g., ATM or Frame Relay service). Moreover, the offering of "partnering" plans – whereby some ISPs are favored and others are not – raises the potential for service or price discrimination among ISPs. Instead, the ILECs should focus on providing service to all ISPs that allow them the flexibility to make independent decisions about service offerings and prices.

In addition, ISPs should have the right to obtain non-discriminatory access to essential components of DSL services from ILECs. ILECs must not be permitted to delay the provisioning of services to ISPs while they expand their own operations. Likewise, ILECs should not be allowed to intentionally provide inferior quality services to customers of independent ISPs. As CIX has also noted, the ILECs should not be permitted to bundle metropolitan transport services with their xDSL offering. Such transport bundling precludes other CLECs from offering a competitive service to ISPs, which ultimately harms consumers. The ILEC transport bundling practice is also harmful to independent ISPs because it permits ILECs to engage in monopolistic practices, by keeping xDSL retail prices low while inflating transport costs borne by independent ISPs.

The Commission could also require structural separation of the affiliated-ISP from the ILEC, which would address the ILEC's underlying economic interest and motivation for advantaging its affiliated-ISP. CIX believes there is long-term viability to this approach, because

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[18] Typically, the ILEC sets the "wholesale" ADSL price to the ISP at a rate which is just under the "retail" price the ILEC offers consumers for the bundled DSL and Internet access service. Thus, the independent ISP has very little margin to cover its additional

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it minimizes ILEC "cheating" and avoids regulatory oversight of the details of customer choice of ISPs. The affiliated-ISP should generally be subject to the same degree of separation as CIX has recommended for the ILEC's data-CLEC.[19]

IV. RBOC InterLATA Entry Into the Internet InterLATA Services Market Must Follow the Statutory Scheme of Sections 271 and 272

CIX is disappointed to find that the RBOCs have, once again, raised a series of arguments to collectively whittle away every edge of the Section 271/272 interLATA services restriction. CIX urges the Commission to continue to enforce and interpret the plain meaning of these statutory provisions, which provide RBOCs with incentives to open their in-region local networks.

SBC, for example, suggests that the proposed advanced services data affiliate should not be subject to the interLATA service restriction of Section 271 or the requirements of Section 272.[20] This is flatly contradictory of the Section 271(a) restriction, which applies to an RBOC "*and any affiliate* of a Bell operating company." 47 U.S.C. § 271(a) (emphasis added). Further, this proposition contravenes the decision in the MO&O (at ¶¶ 77-78) that the interLATA services restriction applies until the RBOC successfully meets the approval process of Section 271(c). In sum, an "advanced service" option created by the Commission should not be a means of avoiding the statutory process of RBOC entry into interLATA services, including the Section 272 separate subsidiary requirements.

CIX also objects to Ameritech's proposal for a state-by-state LATA modification process on the establishment of a data separate affiliate and a showing of compliance with certain

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costs (such as the ILEC's ATM service charges), which restricts the offering of additional services.

19 See Comments of CIX, CC Dkt. No. 98-147, at 11-24 (Sept. 25, 1998).

20 Comments of SBC Communications at 10.

unbundling and collocation laws.[21] Essentially, Ameritech proposes to turn the LATA modification process into a process of compromise of the "competitive checklist" of Section 271(c)(2). The Commission has already substantially rejected this approach to LATA modifications. MO&O, ¶ 82. In any event, the Act specifically admonishes the Commission not to compromise the Section 271 approval process: "[t]he Commission may not, by rule or otherwise, limit . . . the terms used in the competitive checklist set forth in subsection (c)(2)B)."[22] Moreover, Ameritech makes no case for such a radical departure from these statutory obligations. While Ameritech claims to see a "LATA penalty," it alone may avoid that penalty by meeting the terms of Sections 271/272 on a state-by-state basis.

Moreover, Bell Atlantic posits the novel arguments that "Section 271 covers only telecommunications, not information services"[23] and so an RBOC may provide interLATA information services so long as "it uses leased [interLATA] transmission facilities that are bundled into its information service for a single price."[24] In CIX's view, this is a completely implausible reading of the Section 271 restriction. As an initial matter, Bell Atlantic's definitional interpretations are largely refuted by the Non-Accounting Safeguards Order[25], where the Commission found that the statutory restriction on "interLATA services" includes a restriction on RBOC information services: "a BOC may not provide in-region interLATA

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21 Comments of Ameritech at 70-76.

22 47 U.S.C. § 271(d)(4).

23 Comments of Bell Atlantic at 17.

24 Id. at 13.

25 Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, First Report and Order, 11 FCC Rcd. 21905, ¶¶ 55-57 (1996) ("Non-Accounting Safeguards Order").

information services until it obtains section 271 approval."[26] It follows that the restriction on interLATA information services, as interpreted by the Commission, has separate legal significance and meaning from the restriction on interLATA telecommunications.[27]

Moreover, the Commission has already addressed the substance of Bell Atlantic's contentions. In the Non-Accounting Safeguards Order (at ¶ 120, and n. 276), the Commission found that the bundling of a third-party interLATA transmission component with an RBOC intraLATA information service constitutes an interLATA information service for which Section 271 approval is required. Further, the interLATA component of the service is not "provided" or "offered" by the RBOC only if the customer may access it by a "means independently chosen by the customer . . . . ."[28] The BOC avoids interLATA restriction only when it offers customers of its information service an "equal access" arrangement so that the Bell Company "is neither providing nor reselling the interLATA transmission component of an information service . . . ."[29] Bell Atlantic's argument that an RBOC may bundle the interLATA transmission and Internet

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26 Id. at ¶ 57. It should be noted that Bell Atlantic's argument is largely a challenge to the Commission's decisions in the Non-Accounting Safeguards Order that impose interLATA information service restrictions on Bell operating companies. As such, it is an untimely petition for reconsideration, and should be appropriately dismissed. 47 U.S.C. § 405(a). At best, it is a plea for declaratory ruling or rulemaking, and is beyond the scope of this proceeding.

27 It is also persuasive that the MFJ restriction on interLATA services similarly precluded Bell companies from offering interLATA information services. See Michael K. Kellogg, et al., Federal Telecommunications Law, at § 6.4 (1992) ("any 'information service' conveyed by a BOC across LATA boundaries will constitute a prohibited 'interexchange service'" under the MFJ).

28 Id. at ¶ 117.

29 Id. See also *AT&T Corp., et al., v. Ameritech Corp, et al.*, Memorandum Opinion and Order, File No.s 98-41, 98-42, 98-43, FCC 98-242, at ¶50 (rel. Oct. 7, 1998) (Ameritech and US West arrangement with Qwest exceeds "mere marketing" and involves "provision" of interLATA service in violation of Section 271(a) restriction).

component (commonly termed a "global service provider" or "GSP" service) with Bell Atlantic's own in-region Internet access service would clearly run afoul of Sections 271/272. In addition, Bell Atlantic's position on "interLATA information service" bundling would also seemingly contradict its own statements to the Commission, as well as the Commission's order approving Bell Atlantic's CEI plan for Internet access.[30]

CIX urges the Commission to reject the RBOCs' latest efforts at eviscerating the statutory scheme for their entry into interLATA services.

CONCLUSION

CIX encourages the Commission to regulate ILEC services in a manner that promises consumer choice and diversity of services. Under the integrated approach, this demands that the Commission establish forceful regulatory oversight. With the separate affiliate approach,

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30 *Bell Atlantic Telephone Companies' Offer of Comparably Efficient Interconnection to Providers of Internet Access Services*, Order, 11 FCC Rcd. 6919, ¶ 49 (1996) ("Bell Atlantic states that it will not carry long-distance traffic that originates within its region across LATA boundaries until it receives authorization to provide such services. . . . . end user customers will have to select, and establish separate arrangements with, interexchange carriers to carry traffic to and from servers on the Internet that are located across LATA boundaries. Bell Atlantic argues that the proposed service is simply an access service for connection to the Internet."); id. at ¶51 ("Pursuant to Sections 271 and 272 of the Communications Act, BOCs must provide interLATA information services through separate affiliates.").

competition is the consumer's best protection, so long as the Commission ensures a truly separate affiliate.

Respectfully submitted,

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WASH1:144118:1:10/16/98
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 1998, a copy of the foregoing Reply Comments were mailed, postage prepaid, first class mail to the following:

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